Office-Supreme Court, U.S.
FILED
OCT 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-336

In the Supreme Court of the United States

OCTOBER TERM, 1983

MAINTENANCE CONTRACTORS, INC., PETITIONER

v.

SAMUEL R. PIERCE, JR., SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Berenyi v. *Director, INS*, 385 U.S. 630 6

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 5

Graver Tank & Manufacturing Co. v. *Linde Air Products Co.*, 336 U.S. 271 6

Hellenic Lines Limited v. *United States*, 345 F. Supp. 1385 5

Huntington Steel Corp. v. *United States*, 153 F. Supp. 920 5

Industrial Indemnity, Inc. v. *Landrieu*, 615 F.2d 644 3

Ippolito-Lutz, Inc. v. *Harris*, 473 F.2d 255 3

NLRB v. *Allied Products Corp.*, 548 F.2d 644 4

NLRB v. *Don Burgess Construction Corp.*, 596 F.2d 378, cert. denied, 444 U.S. 940 4

Neely v. *United States*, 546 F.2d 1059 4

S.S. Silberblatt, Inc. v. *East Harlem Pilot Block*, 608 F.2d 28 3

State ex rel. Lien v. *House*, 25 Ohio Op. 6 3

Trans-Bay Engineers & Builders, Inc. v. *Hills*, 551 F.2d 370 ..... 2, 4, 5

United States v. *Kubrick*, 444 U.S. 111 5

Page

Cases—Continued:

United States v. *LePatourel*, 593 F.2d 827 4

United States v. *Wilder*, 80 U.S. (13 Wall.) 254 5

Wollman v. *Gross*, 637 F.2d 544, reh'g denied, 646 F.2d 1306, cert. denied, 454 U.S. 893 4

Statutes:

12 U.S.C. 1715*l*(d)(3) 1

28 U.S.C. (& Supp. V) 2401 4

28 U.S.C. (Supp. V) 2401(a) 2, 3, 4

Ohio Rev. Code Ann. (Page 1981):

§ 2305.07 3
§ 2305.14 3

Miscellaneous:

C. Fifoot, *History and Sources of the Common Law* (1949) 3

Restatement of the Law of Restitution (1937) 3

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a contractor on a housing project insured by the Department of Housing and Urban Development, contends that the court of appeals erred in holding that its suit for unjust enrichment was barred by the statute of limitations.

1. The facts are set forth in the court of appeals' opinion (Pet. App. A1-A3). Briefly, petitioner contracted with St. Matthew Management Corporation to do construction work on an apartment project owned by St. Matthew in Cleveland, Ohio. The project was financed by Cleveland Trust Company, to which St. Matthew gave a mortgage. The mortgage was insured and guaranteed by the Department of Housing and Urban Development (HUD) pursuant to 12 U.S.C. 1715*l*(d)(3).

In 1970 St. Matthew defaulted on its construction contract, which was about 90% completed, and work was terminated. Pursuant to the terms of the mortgage insurance contract, Cleveland Trust Company then assigned the mortgage to the Secretary on October 13, 1970. The Secretary began foreclosure proceedings against St. Matthew in 1971; title was eventually granted to the Secretary in 1973, and a deficiency judgment entered against St. Matthew. Pet. App. A2.

Petitioner had filed a mechanic's lien against the property in the amount of $181,454.37, which it claimed was due on its contract with St. Matthew, but failed to collect that sum in the foreclosure proceedings. On April 27, 1979, it filed this action for unjust enrichment against the Secretary in the United States District Court for the Northern District of Ohio. Pet. App. A2.

The Secretary moved to dismiss on the ground that petitioner had not brought suit within six years of the accrual of its claim, as required by 28 U.S.C. (Supp. V) 2401(a). The district court granted the motion (Pet. App. A7-A9), and petitioner appealed.

In the court of appeals, petitioner argued that: (1) 28 U.S.C. (Supp. V) 2401(a) is inapplicable because this action is against the Secretary in his official capacity, not against the United States; (2) its cause of action accrued not on October 13, 1970 (when the St. Matthew contract was declared breached and the mortgage assigned to the Secretary) but in 1976, when the District of Columbia Circuit decided *Trans-Bay Engineers & Builders, Inc.* v. *Hills*, 551 F.2d 370; and (3) HUD acknowledged the debt in the course of the foreclosure proceedings, thereby restarting the six-year limitations period.

The court of appeals rejected each of these arguments. It declined to consider the first, which petitioner had not raised in the district court. The court of appeals noted,

though, that there was no basis for the distinction proposed by petitioner. Pet. App. A3-A4. Concerning the second argument, the court found inapposite the analogy to cases of fraudulent concealment. In any event, the court pointed out, the *Trans-Bay* decision itself was not unforeseeable. *Id.* at A4-A5. Finally, the court of appeals agreed with the district court's finding that the record simply does not show the "unqualified and direct admission" of indebtedness by HUD essential to an acknowledgement (*id.* at A5-A6).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is unwarranted.

a. Petitioner argues (Pet. 5-7) that an action for unjust enrichment against the Secretary of HUD in his official capacity is not an action against the United States subject to the six-year limitations period in 28 U.S.C. (Supp. V) 2401(a). The court of appeals correctly rejected this argument. *Industrial Indemnity, Inc.* v. *Landrieu*, 615 F.2d 644 (5th Cir. 1980), and *S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block*, 608 F.2d 28 (2d Cir. 1979), upon which petitioner relies, dealt not with Section 2401(a) but with the issue of sovereign immunity. In the only other case we are aware of that involves application of the statute of limitations in an unjust enrichment action against the Secretary of HUD in his official capacity, the court unhesitatingly applied Section 2401(a)'s six-year limitations period. *Ippolito-Lutz, Inc.* v. *Harris*, 473 F. Supp. 255, 260-261 (S.D.N.Y. 1979).[1]

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[1] We note that even if Section 2401(a) did not apply, Ohio law might well impose the same six-year limitations period. Petitioner first suggested in the court of appeals that the ten-year period in Ohio Rev. Code Ann. § 2305.14 (Page 1981) would control. The court declined to consider the issue (Pet. App. A5). But petitioner states its claim as one for "quantum meruit and unjust enrichment" (Pet. 3), both of which fell

b. Petitioner also argues (Pet. 3-5) that even if 28 U.S.C. (Supp. V) 2401(a) is applicable, its claim did not accrue until December 30, 1976, when the District of Columbia Circuit decided *Trans-Bay Engineers & Builders, Inc.* v. *Hills, supra.* In support of this argument petitioner relies on *NLRB* v. *Don Burgess Construction Corp.*, 596 F.2d 378, 382-383 (9th Cir.), cert. denied, 444 U.S. 940 (1979), and *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977). Those cases simply applied the rule that a party who exercises due diligence to uncover the facts of a fraudulently concealed cause of action will not be barred by the statute of limitations. Petitioner, by contrast, was aware of the facts underlying its claim as early as 1970, and there has been no fraudulent concealment of any kind here.

In essence, petitioner's argument is that it should be excused from complying with Section 2401(a) because its cause of action has only recently found favor in the courts.[2] It is questionable whether this theory can properly be permitted to extend a waiver of sovereign immunity beyond the

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under the heading of general assumpsit at common law. C. Fifoot, *History and Sources of the Common Law* 360-363 (1949); Restatement of the Law of Restitution 4-9 (1937). The Ohio courts have suggested that § 2305.14 applies only to actions that are exclusively equitable in nature. *State ex rel. Lien* v. *House*, 25 Ohio Op. 6 (C.P. 1942). The more appropriate limitations period for claims such as petitioner's would thus seem to be Ohio Rev. Code Ann. § 2305.07 (Page 1981) (six-year period for contracts not in writing).

[2]Two cases not cited by petitioner—*United States* v. *LePatourel*, 593 F.2d 827 (8th Cir. 1979), and *Neely* v. *United States*, 546 F.2d 1059, 1068 (3d Cir. 1976)—although distinguishable from the present case in many respects, seem to offer some support for this claim. Both those cases were decided before this Court's decision in *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979), which indicates that a plaintiff's ignorance of his legal theory will not extend the limitations period fixed by 28 U.S.C. (& Supp. V) 2401. Those cases have not been followed elsewhere, nor reapplied by the courts that decided them. See *Wollman* v. *Gross*, 637 F.2d 544, 547-549 (8th Cir. 1980), reh'g denied, 646 F.2d 1306, 1307 (Lay, C.J., dissenting), cert. denied, 454 U.S. 893 (1981).

time fixed by Congress, and to override the principle of repose and the concerns about stale evidence embodied in statutes of limitations. Cf. *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979). Changes in the law have not generally been thought sufficient to override the parallel policies underlying the rule of res judicata. *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). In any event, as the court of appeals noted, the holding in *Trans-Bay* — if in fact it supports the type of claim raised by petitioner — was foreshadowed by other cases decided within petitioner's unextended limitations period (Pet. App. A5).[3]

c. Finally, petitioner argues (Pet. 4) that the Secretary acknowledged his debt in the course of foreclosure proceedings, thereby starting the six-year limitations period anew. This argument is also without merit. As this Court has long held, an acknowledgment of indebtedness must be unequivocally expressed. See, *e.g.*, *United States* v. *Wilder*, 80 U.S. (13 Wall.) 254 (1872); see also *Hellenic Lines Limited* v. *United States*, 345 F. Supp. 1385, 1389 (S.D.N.Y. 1972); *Huntington Steel Corp.* v. *United States*, 153 F. Supp. 920, 923 (S.D.N.Y. 1957). Here the court of appeals correctly noted that:

> [Petitioner] was named a party in [the foreclosure] proceeding because it had filed a mechanic's lien against St. Matthew and the subject property. As found by the district court, nowhere in this record is there any "unqualified and direct admission" by [HUD] that it owed any debt to [petitioner], nor is there acknowledgment by H.U.D. of any responsibility to pay the mechanic's lien.

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[3]It should be noted that petitioner did not bring this action for more than two years after *Trans-Bay* was decided.

Pet. App. A5 (citations omitted). These factual findings, concurred in by two courts below, are not a suitable subject for plenary review in this Court. *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Director, INS*, 385 U.S. 630, 635 (1967).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1983

DOJ-1983-10